Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies Mobilitie, LLC Petition for Declaratory Ruling	WT Docket No. 16-421

Reply Comments of ExteNet Systems, Inc.

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SUMMARY

The comments in this proceeding confirm the factual and legal discussions set forth in ExteNet's opening comments. ExteNet and other companies deploying distributed network systems ("DNS") regularly encounter local governments that impose barriers to entry that prohibit or effectively prohibit the provision of telecommunications services. In particular, the comments confirm that delay is common – regularly exceeding the reasonable times for action defined by the Commission in the 2009 *Shot Clock Order*. Formal and *de facto* moratoria are widespread.

Local governments' comments focus on 75 to 120 foot tall new poles that are not the DNS facilities deployed by ExteNet and other providers. The DNS facilities installed and discussed by ExteNet, as well as WIA and others, are similar in size and appearance to the ubiquitous telecommunications, cable television, and electric company equipment installed in the public rights of way and justify no special treatment. Yet, ExteNet frequently encounters local governments that impose zoning or *ad hoc* zoning-like discretionary requirements on DNS facilities. In ExteNet's experience, such discretionary, zoning requirements are not imposed on any other right of way occupants. The local governments are singling-out DNS facilities solely because the DNS facilities incorporate an antenna. That imposition of disparate, highly discretionary regulation is a significant prohibition on the ability of ExteNet to compete in a fair and balanced regulatory environment.

Contrary to the assertions by some local government commenters, the agreements and ordinances they identify are not necessarily reasonable and do not demonstrate that industry members agree with local government demands. Rather, such agreements frequently reflect the

leverage of local governments and the fact that telecommunications providers may have no choice but to accede to local demands.

Assertions by local government commenters that delays are caused by applicants are misplaced. ExteNet and other industry commenters' experience is that delay is caused by the overreaching of local governments, lack of clear requirements, and local governments frequently changing their rules and desires. ExteNet and AT&T, for example, describe multi-year delays caused by local governments that seek to second-guess and micromanage every aspect of the proposed deployment, including technical and business elements. Indeed, local government comments confirm that they seek to decide whether particular services are actually needed in their communities, and that they believe they can second-guess and dictate technology choices. Yet, that is not the role set for local governments under the 1996 Act.

The record also supports the need for the Commission to adopt a more meaningful remedy for local government delays. Filing a lawsuit, which will be time consuming and potentially lead to a meaningless remedy, is not a realistic option, particularly when ExteNet potentially would have to file tens of lawsuits per year to remedy every violation of the Commission's *Shot Clock Order*. Accordingly, ExteNet supports comments proposing that unreasonable delay by local government result in the application being deemed granted.

Local governments assert that their interest is in managing the public rights of way, but the record demonstrates that local governments' actual actions and stated interests are not limited to legitimate right of way management concerns. The Commission and courts have defined the narrow meaning of "management" of the public rights of way to include only coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using

the rights-of-way to prevent interference between them. Discretionary zoning or zoning-like requirements, or similar *ad hoc* discretionary processes, do not address those issues relevant to managing physical occupation of the public rights-of-way. Indeed, local government comments confirm that the zoning and zoning-like requirements they seek to impose on DNS facilities are separate from and in addition to the standard rights of way management permitting applied to other companies.

Similarly, the comments reveal that local governments focus on second-guessing the legal status of companies, such as ExteNet. The Commission should confirm and declare that under the 1996 Act, local governments are not authorized to scrutinize companies' regulatory status, particularly where the company, such as ExteNet, has been issued a certificate of public convenience and necessity by the state utility commission authorizing it to provide telecommunications services.

Based on the record developed in this proceeding, the Commission should issue a declaratory ruling clarifying the Section 253 standards applicable to local government regulation of DNS facilities in the public rights of way. Contrary to local government comments, the Commission has broad authority to issue such a declaratory ruling, as repeatedly confirmed by the courts. Specifically, ExteNet asks that the Commission declare that:

- Section 253 of the Communications Act of 1934, as amended, prohibits regulations imposed on DNS facilities that reserve to the local government unfettered discretion that exceed the narrow authority reserved to manage physical occupation of the public rights of way;

- Local permitting requirements for DNS facilities that are not applied to other communications or utility users of the public rights of way constitute an effective prohibition on the provision of telecommunications services in violation of Section 253(a) and are not permissible under Section 253(c);

- Unreasonable delay of the local permitting process constitutes an effective prohibition of service under Section 253(a), and that it is a prohibition of service for a locality to

take longer than 60 days to act on a request for permission to install DNS facilities in existing public rights of way;

- The analysis of an effective prohibition of service via DNS facilities under Section 253 is not the same as the judicially-crafted standard currently applied in Section 332 cases. The standards developed for Section 332(c)(7) cases for traditional macro sites are inapplicable to and anachronistic for DNS facilities.

In addition, the Commission should clarify that under Section 253(c), local governments are not free to profit from or demand rent for the public rights of way. Local governments are not in the role of private landlords. They regulate the public rights of way in trust for the public, and communications and utility installations are a well-established use for the public rights of way, not a special use justifying municipal profit. The Commission should confirm that Section 253(c) limits local governments to fees that recover their costs of managing the use by the particular telecommunications provider, and thus prevents local governments from leveraging their control over the public rights of way for profit.

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I. INTRODUCTION

ExteNet Systems, Inc. ("ExteNet") submits these comments in reply to the initial comments filed in this proceeding and in further support of ExteNet's opening comments.

The record in this proceeding confirms that the deployment of telecommunications infrastructure and services is being stifled by local government delays, discrimination, and overreaching. The comments of industry participants confirm and expand on ExteNet's experience. Rather than contradicting the need for Commission action, the comments of local governments reveal how important Commission action is to remedy local government regulations that have gone far afield of the deregulatory mandates of the Telecommunications Act of 1996 ("1996 Act").

ExteNet urges the Commission to view the comments in this proceeding through the lens of the 1996 Act. Congress intended for free markets and innovation to drive the deployment of new technologies and services – free from local government interference. The 1996 Act was supposed to eliminate the ability of local governments to decide which providers would be allowed to deploy services. The 1996 Act empowered the Commission to act to promote that vision by preempting regulations and requirements that interfered with the Act's deregulatory paradigm.

The comments in this proceeding reveal that the vision and intent of the 1996 Act have been significantly compromised. Local governments view themselves as arbiters of the market, seeking to dictate technologies, favoring "traditional" technologies over new, and generally micromanaging the deployment of distributed network systems ("DNS") in the public rights of way. As ExteNet's and other parties' opening comments emphasize, local governments' treatment of DNS facilities is discriminatory and unjustified. Local governments are singling-

out DNS facilities for discretionary and burdensome zoning or *ad hoc* zoning-like regulation based solely on the fact that the DNS facilities incorporate wireless equipment. Yet, DNS facilities are similar in size and impact to other telecommunications and utility facilities that are installed in public rights of way pursuant to standard, ministerial permitting.

All three current FCC Commissioners have acknowledged the importance of expediting deployment of the infrastructure and facilities that are needed to meet current consumer demands and to support the deployment of next generation service. Chairman Pai recognized it as recently as his comments to the U.S. – India Business Council on March 29, 2017.[1] Likewise, Commissioner O'Reilly recognized in his testimony to Congress that "standing in the way of greater Internet access nationwide are barriers imposed by state, local, and tribal entities."[2] Commissioner Clyburn also recognized the need for "necessary infrastructure, such as small cells and distributed antenna systems (DAS)."[3]

Accordingly, as described below and in ExteNet's initial comments, the Commission should act in this proceeding by issuing a declaratory ruling addressing the proper interpretation

[1] Remarks of FCC Chairman Ajit Pai to U.S. – India Business Council, Washington DC (Mar. 29, 2017) (noting that "the most powerful tool for unleashing investment and innovation is a competitive free market" which can be promoted through "eliminat[ing] unnecessary barriers to infrastructure investment that could stifle broadband deployment.").

[2] Testimony of FCC Commissioner Michael O'Rielly Before U.S. Senate Committee on Commerce, Science, & Transportation, "Oversight of the Federal Communications Commission (Mar. 8, 2017) ("FCC Oversight Hearing") ("[S]tanding in the way of greater Internet access nationwide are barriers imposed by state, local, and tribal entities. . . . This problem will become even more acute as providers seek to deploy the next generation, or 5G wireless services, that . . . will also require many more wireless tower and antenna siting approvals. I realize that preempting local community decisions is a difficult topic to contemplate, but it has become necessary and appropriate for the Commission to exercise authority provided by Congress to address this situation.").

[3] Testimony of FCC Commissioner Mignon Clyburn Before FCC Oversight Hearing (Mar. 8, 2017) ("In order to reap the benefits of 5G services, however, we need to not only have adequate spectrum, but the necessary infrastructure, such as small cells and distributed antenna systems (DAS), to deploy that spectrum.").

and application of Section 253 and Section 332(c)(7) as applied to the deployment of DNS in the public rights of way.

II. COMMENTS CONFIRM THE NEED FOR COMMISSION ACTION

In its opening comments, ExteNet described its experiences dealing with local governments and how those experiences demonstrate the need for the Commission to take action in this proceeding to promote the deployment of broadband and telecommunications services. The comments filed by other parties further support the need for Commission action.

A. Municipal Regulation Is Delaying The Timely Deployment Of Telecommunications Services

Wireless industry comments confirm ExteNet's experience that lengthy delays caused by local government rules and regulations are a common experience. AT&T and Verizon catalogue instances in which local governments refused to negotiate, delayed negotiations, or otherwise held up the process of permitting small wireless deployment indefinitely.[4] Both Verizon and T-Mobile confirm that some communities insist on a master license or lease agreement before accepting any permit applications, but that "too often local officials simply refuse to negotiate,"[5] or, if they do negotiate, the process may drag on for periods from six months to years.[6]

Many wireless industry commenters have shared ExteNet's experience with flat out bans, or moratoria, lasting indefinitely.[7] Other providers confirm they experience multi-year proceedings with localities that effectively preclude them from delivering service during the entirety of the delay.[8] Crown Castle reported "pre-application" processes that include multiple

[4] AT&T at 7-9; Verizon Wireless at 7.

[5] Verizon Wireless at 7.

[6] Verizon Wireless at 8; T-Mobile at 6.

[7] AT&T Comments at 7; Mobilitie at 10 – 11; T-Mobile at 6; WIA at 15 – 17;

[8] AT&T at 7-8 (moratoria), 9 (two year delay), 15 (one year delay) 24-25; Verizon Wireless at 8.

cycles of delay before an application can even be submitted.[9] ExteNet has also experienced such "pre-application" requirements that can delay even filing a permit application for months.

The Wireless Infrastructure Association ("WIA") provides a detailed catalogue of the ways in which local governments prohibit or delay construction and delivery of service by extending processing, imposition of requirements designed for macro towers, refusal to apply the permit processes applied to other users of the rights of way, uncertain processes or no processes at all, and moratoria.[10] Indeed, although some local governments claim that their reviews of wireless applications for the use of public rights of way are expeditious, communities regularly require DNS providers to go through the full zoning process, leading to more delay.

B. ExteNet's Facilities Are Consistent With Existing Communications and Utility Infrastructure

As a threshold matter, it is critical to recognize what ExteNet is proposing and what it is not. In its comments, ExteNet clarified that the definition of a Distributed Network System ("DNS") for purposes of this proceeding should be the definition used in the Commission's First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas and in recent state legislation.[11] These facilities include only antennae and associated equipment that fit or could fit within small enclosures, defined as no more than six cubic feet for

[9] Crown Castle Comments at 21-22; *See also Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 U.S. Dist. Lexis 93699 (S.D.N.Y. 2013) (Town took approximately two years and nearly 20 meetings with evolving demands before application would be "deemed complete.").

[10] WIA Comments at 5-17.

[11] First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Public Notice, Wireless Telecommunications Bureau Announces Execution of First Amendment to Nationwide Programmatic Agreement for Collocation of Wireless Antennas, 31 FCC Rcd. 8824, 8829 (2016); ExteNet Comments at 2.

the antennae and no more than 28 cubic feet for equipment.[12] In addition, the only facilities covered by ExteNet's proposed declaratory ruling would be new or existing poles or other support structures located within the public rights of way that are no greater than 50 feet above ground level or ten feet in height above the tallest existing utility pole within 500 feet of the installation, whichever is greater.[13]

The DNS equipment that ExteNet has defined and discussed is entirely consistent with the communications, cable television, and electric company facilities that are ubiquitous in the public rights of way. And like those other facilities, ExteNet's DNS facilities are designed and intended to be deployed using existing utility and street light pole infrastructure to the extent possible.

[Comments continued on next page]

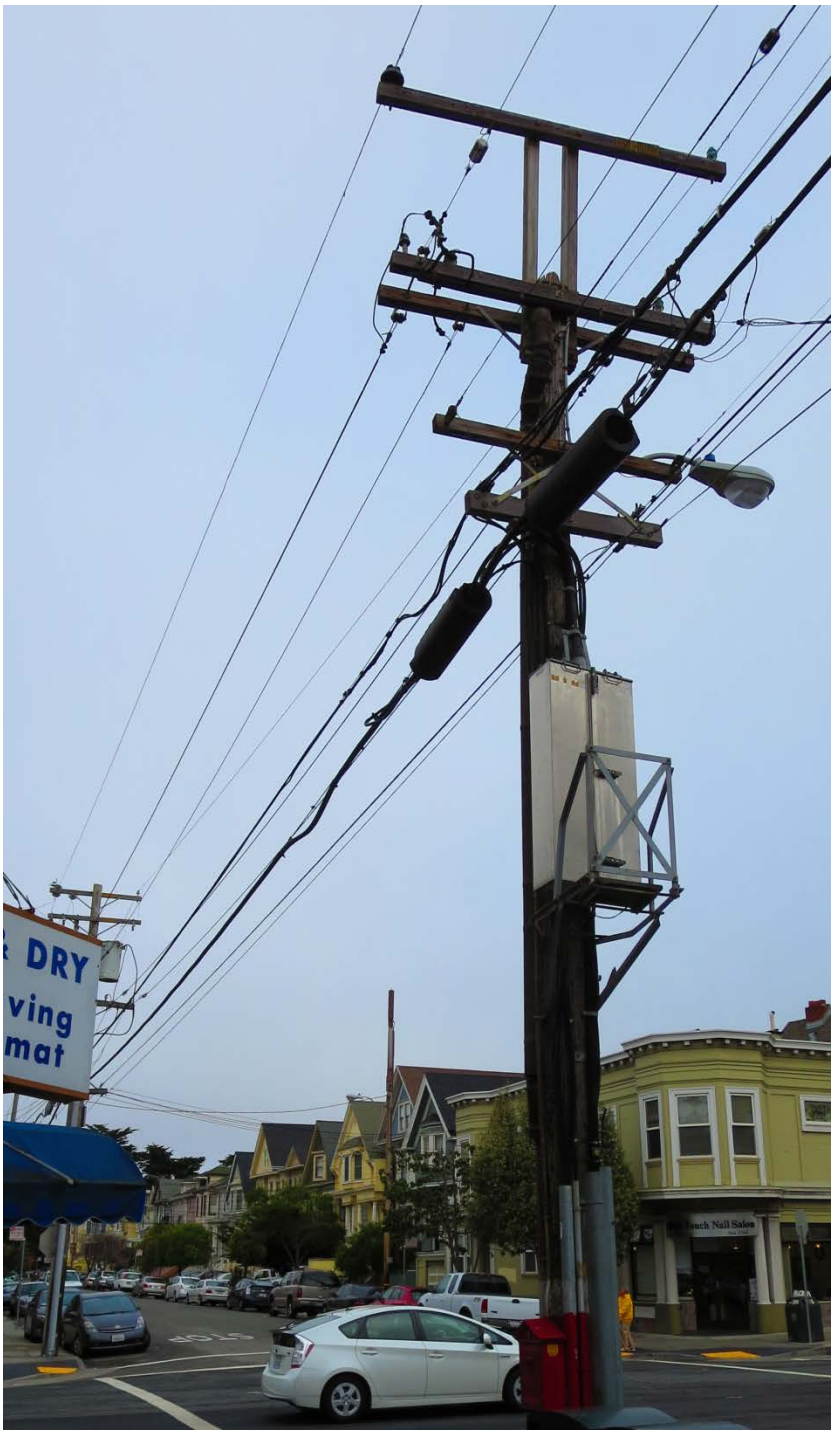
[12] ExteNet Comments at 2.

[13] ExteNet Comments at 2-3.

The photograph below depicts an ExteNet antenna installation in San Francisco surrounded by equivalent sized poles and equipment. The small wireless facility antenna is located on the top of the pole in the center of the photograph. The pole on the left of the photograph has another company's equipment box and an electric transformer, while the pole across the street on the right side of the frame also has another company's equipment box.

Below is another photograph of an ExteNet antenna installation in San Francisco. The photograph emphasizes that ExteNet's facilities are entirely consistent with the equipment installed on poles by electric companies, telecommunications providers, and cable television operators.

The photo below shows a wireline telephone box on a pole (in the foreground of the photo) in San Francisco surrounded by other utility attachments. There is a small wireless facility with the antenna top-mounted on the pole across the street in the background that is nearly invisible



because it blends in seamlessly with the existing pole. These photographs demonstrate that DNS facilities, as defined by ExteNet and others, are similar to the ubiquitous communications and utility facilities installed in the public rights of way – a fact confirmed by at least two courts.[14]

C. Local Governments Do No Subject Other Rights Of Way Occupants To Zoning

Despite the fact that ExteNet's DNS facilities are identical to other telecommunications and utility facilities deployed in the public rights of way and raise no unique concerns, cities frequently impose zoning and similar discretionary requirements only on DNS facilities. In ExteNet's experience, local governments either formally, in their local code, or as a practical matter exempt all telecommunications, cable television, and electric utility facilities in the public rights of way from zoning, or else declare them to be permitted uses in all areas.[15] Local governments typically have a standard, ministerial process by which permits are issued for "wireline" telecommunications, communications and electric facilities in the public rights of way. But for DNS – only because it incorporates an antenna and supports wireless services – those same local governments are subjecting ExteNet's applications to a formal zoning process or some similar, *ad hoc*, discretionary process. Those zoning or zoning-like processes subject

[14] *Crown Castle NG Atlantic, LLC v. City of Newport News*, No. 4:15CV93, 2016 WL 4205355, at *13 (E.D. Va. Aug. 8, 2016) ("Although the equipment differs in function, the equipment installed by Verizon, Dominion, and Cox is often similar in size and sometimes larger than the equipment attached at each of Crown Castle's four Node locations."); *T-Mobile West Corp. v. City & Cty. of San Francisco*, No. CGC-11-510703, at 8 (Super. Ct. S.F. Cty. Nov. 26, 2014) ("the pieces of equipment, including antennas, installed on utility poles in the public right-of-way by Plaintiffs are generally similar in size and appearance to the pieces of equipment installed on utility poles in the public rights-of-way by other right-of-way occupants, including but not limited to PG&E, Comcast, and AT&T.").

[15] *See also, e.g.*, *City of Newport News*, 2016 WL 4205355, at *7 (holding city did not require zoning approval of other telecommunications, cable television, and electric equipment); *City of San Francisco*, No. CGC-11-510703, at 8 (city does not require any site-specific permit for wireline telecommunications, cable television, and electric equipment on utility poles).

DNS applications to wholly discretionary review processes that investigate the business need for the installation, the choice of technology, and nearly every other aspect of the installation. Indeed, they are frequently the same application processes as applied to major development projects. The zoning or zoning-like discretionary processes are not related to rights of way management.

For example, the Virginia Joint Commenters describe how there is a standard right of way access permit process that applies to all public rights of way users,[16] but that for "wireless" equipment there is an *additional*, separate zoning requirement.[17] In other words, there is one permitting process that is used to manage the public rights of way. But for networks that involve "wireless" equipment, the communities are imposing an entirely separate regulatory regime that goes beyond the issues necessary to manage the use of the public rights of way and addresses questions about whether the facilities will even be allowed and under what conditions. Similarly, in San Francisco those other facilities in the same public rights of way are not subject to the discretionary scrutiny that the City imposes on ExteNet's DNS facilities. It is only because ExteNet's facilities incorporate an antenna that they are being singled out for regulation and potential exclusion.

There is no justification for such discriminatory treatment. ExteNet's facilities are similar in size and impact to many other facilities in the public rights of way and justify no special treatment. As ExteNet explained in its opening comments, this discriminatory treatment of DNS facilities is a significant and meaningful impediment to the deployment of DNS, and it materially inhibits and limits ExteNet's ability to compete in a fair and balanced regulatory environment.

[16] Virginia Joint Commenters Comments at 16.

[17] *Id.* at 9-10.

D. The Local Agreements And Ordinances Cited By Local Governments Are Not Proof That Commission Action Is Unnecessary

Several local government commenters point to allegedly cooperative model ordinances or agreements as evidence that local governments are reasonable and working with industry.[18] Although ExteNet always seeks to work with local government, the agreements and ordinances discussed by some commenters are not a substitute for Commission action. The mere fact that a provider or providers have executed an agreement with a local government does not mean the terms and conditions are reasonable. Rather, such agreements frequently are the result of multi-year long delays and reflect the fact that providers have little or no alternative. Providers must either accept the local government's demands or they will not be able to provide service.

E. The Delays ExteNet Has Experienced Are Not Caused By ExteNet

In its opening comments, ExteNet chronicled its experience with delays caused by various municipal actions, including lack of clear rules, refusal of cities to follow their own rules, ambivalence, and outright hostility.[19] Local government comments try to paint a different picture, claiming that applicants are the cause of delays.[20] However, the examples relied on by local governments in support of their assertion that applicants are to blame for delay focus on new pole applications by Mobilitie.[21] Rather than contradicting the need for Commission action,

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[18] *See, e.g.*, City of Houston Comments at Exhibit A; NLC Comments at 8-9; Cities in Washington State Comments at 3; Texas Municipal League Comments at 18-19; Georgia Municipal Ass'n Comments at 3-4; Illinois Municipal League Comments at 2; City and County of San Francisco ("San Francisco") Comments at 9; San Antonio Coalition Comments at 9.

[19] ExteNet Comments at 5-6.

[20] *See, e.g,* National League of Cities et al Comments at 12-13 ("NLC Comments"); Pennsylvania Ass'n of Township Supervisors, *et al.* ("PA Muni") Comments at 5-6; Siting Coalition Comments at 6, 18; Joint Comments of League of Arizona Cities and Towns, et al. ("California Coalition") at 11.

[21] *See, e.g.*, NLC Comments at 13-16; Smart Communities Siting Coalition ("Siting Coalition") Comments at 20-21 (citing delays due to application to install 75 and 100 foot tall poles in

the cities' focus on 75 to 120 foot tall new poles installed by Mobilitie reinforce ExteNet's point that DNS facilities, as proposed to be defined by ExteNet, can and should be treated on the same expedited timeframe as "non-wireless" telecommunications equipment installed in the public rights of way. The processes that local governments allege are required to review those 75 to 100 foot tall new poles, even if appropriate for them, are inapplicable to ExteNet's DNS facilities, which are equivalent to traditional installations on utility and light poles.

In addition, municipal arguments that applications are "incomplete" often reflect not a failure by the providers, but rather the lack of clear regulations that ExteNet described in its initial comments.[22] The inconsistency of local requirements, alone, is a significant barrier to deployment.[23] From one community to the next, even in the same geographic area, officials can impose radically different application requirements – even though ExteNet is seeking to deploy the same DNS equipment in each of them. That inconsistency prevents ExteNet from efficiently deploying regional or statewide networks.

Consistent with ExteNet's experience, many other commenters also explained that they have frequently encountered delay caused by local governments that refuse to follow their own standard right of way process and will essentially make up the process on an *ad hoc* basis, changing the demands during the process.[24] Yet, some municipal commenters now seek more time, for example, arguing that the shot clock should not run until a "complete" application is

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historic districts or on sidewalks near handicap ramps); Florida Coalition Comments 17-18, 20-33; PA Muni Comments at 9.

[22] ExteNet Comments at 9-10.

[23] ExteNet Comments at 6-7.

[24] WIA Comments at 14-15; Lightower Comments at 5; ExteNet Comments at 5, 9-15; Crown Castle Comments at 21-22.

submitted.[25] That proposal would create a loophole that would swallow the rule. ExteNet has repeatedly experienced local governments that refuse to agree that an application is complete, despite the fact that the application fully complies with the local code. The very point of the Commission's rules requiring cities to identify, in writing, the specific regulations they asserted were not met, and also holding that the shot clock is not tolled by subsequent demands for information that were not part of the original notice citation, was to prevent such behavior.[26]

Finally, there is no evidence that shorter time frames for approval will overwhelm some communities that lack the resources to review new applications.[27] Communities regularly permit other right of way installations on a standard, ministerial basis in a matter of days or maybe weeks.[28] The issue is not the volume of applications. The problem, if there is one, is that communities attempt to micromanage every aspect of DNS deployment. In its comments, AT&T provided an example that is very similar to what ExteNet has experienced. AT&T described a California city that created a multi-year delay by scrutinizing the design and operational details of each node, including issues such as whether a macro site or DAS node would best cover an area, antenna designs, RF exposure, property values analyses, stealthing, equipment placement (above or below ground level), acoustic noise studies, screening, placement away from intersections, and network performance.[29] ExteNet has had the same

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[25] California Coalition Comments at 21-22.

[26] *2014 Wireless Infrastructure Order*, 29 FCC Rcd. at ¶ 257-260, 262; *see also* 47 C.F.R. § 1.40001(c).

[27] *See, e.g.*, Washington Cities Comments at 13 ("[P]lacing a new shot clock requirement on staff for small cells will create an added burden on cities, one which they may not have sufficient personnel to accommodate.").

[28] *See* Lightower Comments at 6-8 (discussing experience with fiber deployment versus small wireless facilities).

[29] AT&T Comments at 23.

experience many times. The delay is not caused by the applicant, or even the volume of applications, it is caused by the fact that the local government seeks to micromanage this new technology deployment. Or as the two-year experience ExteNet described in its opening comments reveals, the delay can be driven by local political changes.[30] The 1996 Act did not intend to leave telecommunications deployment to the ever-changing tide of local politics.

An all too familiar example of the way in which cities and municipal consultants treat "wireless" installations as cash cows occurred in *MetroPCS New York, LLC v. City of Mount Vernon*.[31] In that case, Mount Vernon used a consultant to review wireless siting applications. Although the City charged only $500 for applications for "special use permits" for all other development projects, it charged $6,000 to $12,000 for permit applications for wireless telecommunications facilities.[32] The court held that "Defendant has not presented any evidence explaining why it is more labor-intensive or time-intensive to review a special permit for a wireless telecommunications facility than another major construction project subject to the $500 special use permit application fee such that the fee for a telecommunications facility should be twelve to twenty-four times higher."[33] The Court expressed its concern that "[t]he City of Mount Vernon has unlimited discretion to charge a wireless carrier prohibitive fees by simply dragging out the process and utilizing consultants for its convenience-rather than out of necessity."[34] Finally, the Court noted that "the extraordinary costs incurred in this case were largely due to

[30] ExteNet Comments at 11-15.

[31] 739 F. Supp.2d 409, 425 (S.D.N.Y. 2010).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 425-426.

unreasonable delays as the City discriminated against MetroPCS and denied its application without substantial evidence."[35]

F. The Record Supports The Need For A Meaningful Remedy For Shot Clock Violations

In its initial comments, ExteNet explained that despite the Commission's actions in the 2009 *Shot Clock Order*[36] and 2014 *Wireless Infrastructure Order*[37] to promote the timely deployment of small wireless facilities, there still is a need for a more meaningful remedy than a court order demanding that a community take action. For ExteNet, in an approximately two-year period, to obtain relief from violations of the shot clock rules it would have had to file a federal lawsuit at least 47 times.[38] Those lawsuits would then take months to reach a summary judgment motion, and in the end, even if the court found a violation of the shot clock, there is a risk the court's "remedy" may be to remand the matter back to the local government with only an order to finally issue a decision.[39] Such a scenario is untenable.[40]

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[35] *Id.* at 426.

[36] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 FCC Rcd. 13994 (2009) ("*Shot Clock Order*"), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[37] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865¶ 257-260, 262 (2014) ("*2014 Wireless Infrastructure Order*").

[38] ExteNet Comments at 5.

[39] *See, e.g., Up State Tower v. Town of Kiantone*, No. 1:16-cv-00069, 2016 WL 717832 (W.D.N.Y. Dec. 9, 2016).

[40] Lightower, likewise explained that "[h]aving to bring suit in every such case [of a shot clock violation] would, in and of itself, effectively prohibit Lightower from providing telecommunications service." Lightower Comments at 5. Lightower also explained that the Commission has broad authority to preempt local requirements that have the effect of prohibiting the provision of telecommunications services under Section 253(d). Lightower explained that the Commission can and should also exercise issue a declaratory ruling that failure to act within 60

Other commenters reported a similar situation.[41] For example, Verizon articulated the problem with enforcement of the current shot clock, and explained that the Commission has authority to adopt a deemed granted remedy.[42] Verizon pointed out that the Commission had adopted a deemed granted remedy for Section 621 when local authorities unreasonably refuse to grant a competitive cable television franchise within a specified period, which was affirmed on appeal by the Sixth Circuit.[43] Likewise, AT&T articulated the inadequacy of the current shot clock enforcement mechanism and urged the Commission to adopt a deemed granted remedy.[44]

ExteNet supports all of those comments and the adoption of a deemed granted remedy. A ruling by the Commission that municipal delay violates the Act must be meaningful. Adopting a deadline for local government to act that is measured in days, but then requiring months to enforce it, completely nullifies the Commission's ruling.

G. Comments Show that Local Government Regulation of DNS Facilities Is Not Tied to Regulation of the Public Rights of Way

ExteNet and other industry commenters do not dispute that local governments have authority under Section 253(c) to manage the public rights of way on a competitively neutral and nondiscriminatory basis. But that is not what local governments are doing with respect to the deployment of DNS facilities.

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days is a prohibition of service in violation of Section 253(a), and that the result would be that the application would be deemed granted. Lightower Comments at 24-25.

[41] *See, e.g.*, Crown Castle Comments at 22-24; T-Mobile Comments at 25-28; CTIA Comments at 40-43.

[42] Verizon Comments at 23.

[43] Verizon Comments at 24-25.

[44] AT&T Comments at 25-26. AT&T explained that a deemed granted remedy would not be inconsistent with the text of Section 332(c)(7)(B)(v) because the statute provides that a person "adversely affected by any final action or failure to act by a State or local government *may* . . . commence an action in any court of competent jurisdiction," and the permissive nature of the statute leaves room for the Commission to fashion other remedies. *Id.* at 26.

The comments reveal that local governments seek to single-out DNS facilities for extensive regulation based solely on the fact that they include wireless equipment. Local governments are not limiting themselves to legitimate rights of way management issues. Instead they seek to regulate nearly every element of DNS deployment. Essentially, they believe that they should decide whether a network is needed and then control and dictate the design and deployment of the network as well as its location. In other words, local governments want the polar opposite of the deregulatory system that Congress imposed with the 1996 Act.

1. Local Governments Second Guess Or Reject Service Providers' Regulatory Status

A threshold example of local governments not limiting themselves to legitimate rights of way management that ExteNet frequently encounters is their strategy of focusing on and challenging providers' regulatory status.[45] Cities take this approach as a way to deny that the company has any rights under federal or state laws and thus deny access to the public rights of way or demand unreasonable fees and conditions.

For example, the Arizona, California, New Mexico, and Oregon local governments coalition ("California Coalition") asserts that ExteNet, Crown Castle, Mobilitie, and Verizon Wireless "misrepresent that their status as either a 'telephone corporation' or 'CLEC' under state law entitles them to the same regulatory treatment as electric, water, and natural gas corporations."[46] That assertion is a legal argument by the cities – not a misrepresentation by ExteNet. First, ExteNet has been issued a certificate of public convenience and necessity by the California Public Utilities Commission, and is a "Telephone Corporation" under California

[45] *See, e.g.,* Florida Coalition at 14 (arguing that Mobilitie "and others like it" are not telecommunications providers—notwithstanding the fact that the companies have been certified by the relevant state Commission to provide telecommunications services).

[46] California Coalition Comments at 13-14.

law.[47] Yet, for many years, California cities refused to recognize that ExteNet, and other companies like it, are telephone corporations, arguing that the term did not include companies that incorporate "wireless" equipment – this despite the fact that the statutory definition explicitly applies "with or without the use of transmission wires."[48]

The California Coalition Comments do not reveal "misrepresentation" by ExteNet. Rather, they reveal how cities now refuse to recognize the statewide right to occupy public rights of way granted to telephone corporations by California Public Utilities Code § 7901, and the fact that California Public Utilities Code § 7901.1 requires cities' right of way management to be applied to "all entities in an equivalent manner."[49] ExteNet is not "misrepresenting" its status; cities are refusing to respect the rights of ExteNet. And the cities' actions are unrelated to rights of way management. In ExteNet's experience, cities do not require zoning or similar discretionary approval for right of way deployments of "non-wireless" installations. What ExteNet is seeking is nondiscriminatory treatment, following the standard rights of way permitting as applied to telecommunications facilities that do not involve "wireless" elements.

As comments reveal, ExteNet and Crown Castle have encountered similar issues in Texas, where cities have challenged ExteNet's status as a "certificated telecommunications provider" protected by Chapter 283 of the Texas Local Government Code.[50]

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[47] *See, e.g., Application of NextG Networks of Cal., Inc.*, Decision 10-10-007, 2010 Cal. PUC Lexis 416 at *19 (Cal. PUC Oct. 14, 2010) ("We hold that NextG is now, and has been continuously since we granted its first CPCN, a 'telephone corporation' within the meaning of Pub. Util. Code §§ 234(a) and 7901."), *reh'g denied*, Decision 11-01-027, 2011 Cal. PUC Lexis 25 (Jan. 13, 2011), *aff'd, City of Huntington Beach v. Pub. Util. Comm'n*, 214 Cal. App.4th 566 (Cal. Ct. App. 2013).

[48] Cal. Pub. Util. Code. § 233.

[49] Cal. Pub. Util. Code § 7901.1(b).

[50] Crown Castle Comments at 3, 18. The PA Muni Comments submit a copy of Commissioner Powelson's statement in a Pennsylvania Public Utilities Commission proceeding regarding the

Local governments are not experts in the complex modern telecommunications ecosystem, and there is no reason for them to be. State public utility commissions and the Commission are expert agencies tasked with overseeing entry by the many varieties of telecommunications service providers. State commissions, for example, exercise that role by issuing certificates authorizing companies to engage in the provision of telecommunications services. However, because local governments do not have expertise in the many different services and participants in the complex telecommunications market, or do not like the regulatory permission to occupy the public rights of way given to companies that provide telecommunications services, ExteNet regularly faces city-by-city battles over claims that it is not a telecommunications service provider, even though it has been issued certificates by the state commission. These disputes regarding fundamental legal or regulatory status create barriers and delays that effectively prohibit deployment and are unrelated to rights of way management.

The Commission should reiterate that it is not the role of local governments to second guess or challenge the regulatory status of every new provider or technology. Numerous courts have held that Section 253 prohibits cities from second guessing the status and qualifications of providers in situations where the state commission has already granted the company authority.[51]

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certification of companies that provide telecommunications service via DAS networks. On March 17, 2017, the Pennsylvania PUC issued an Order holding that companies, such as ExteNet, that provide telecommunications services via DAS networks to wireless carriers are themselves providing commercial mobile radio service. ExteNet believes that the Pennsylvania PUC's decision is based on multiple errors of fact and law, and on April 3, 2017, ExteNet filed a Petition for Reconsideration of the Order.

[51] *See, e.g.*, *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 81 (2d Cir. 2002) (invalidating local requirements targeting qualification to provide telecommunications service); *Qwest Commc'ns Corp. v. City of Berkeley*, 255 F. Supp. 2d 1116, 1123 (N.D. Cal. 2003) ("[I]t is not the arena of the City of Berkeley to determine the common carrier status of Qwest or any other communications provider."), *aff'd*, 433 F.3d 1253 (9th Cir. 2006**)**, *overturned*, *Sprint*

2. Zoning Requirements Are Not Related to the Legitimate Health, Safety, and Engineering Concerns of Local Governments

In their comments, certain local governments assert that they are concerned about managing the public rights of way because they seek to ensure installations comply with "current health, safety, building, engineering, and electrical requirements."[52] Yet, local governments' comments and actions reveal that they are not limiting themselves to the legitimate right of way management reserved for them in Section 253(c).

As ExteNet explained in its initial comments, the role of local governments regarding deployment of telecommunications services in the public rights of way was clearly defined in the 1996 Act. Section 253(a) created a broad preemption of local government requirements to remove the ability of State or local governments to choose or influence who could provide telecommunications services, with only the narrow authority to manage the public rights of way on a nondiscriminatory basis left to cities in Section 253(c).[53]

The scope of legitimate right of way management under Section 253(c) is well established. It is not a broad opening to regulate any and all aspects of the industry simply because the facility will be in the public rights of way.[54] Rather, right of way management tasks

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Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008); *AT&T Commc'ns of SW, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) (holding that company's qualification to provide telecommunications service is certificated by the state public utility commission and "may not be second-guessed by the City"); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471 (N.D.N.Y. 2003).

[52] *See, e.g.*, NLC Comments at 10.

[53] *See, e.g., Public Util. Comm'n of Texas*, 13 FCC Rcd. 3460, 3463 ¶ 4 (1997) ("*Texas Preemption Order*"); *see also TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21441-43 ¶¶ 103-109 (1997).

[54] *See, e.g., City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001) (rejecting the argument that the presence of facilities in the right of way justified extensive regulation, stating "the safe harbor provisions would swallow whole the broad congressional preemption"), *overruled by Cty. of San Diego*, 543 F.3d 571 (9th Cir. 2008).

are limited, and include only matters such as "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights of way to prevent interference between them."[55]

Certain local governments' comments in this proceeding confirm ExteNet's experience that many local governments are regulating DNS facilities far beyond legitimate rights of way management. As noted above, ExteNet frequently encounters local governments that, through their "zoning," seek to micromanage every element of ExteNet's system and deployment, such as the design and operational details of each node, including issues such as whether a macro site would best cover an area, antenna designs, RF exposure, and network performance. Likewise, the zoning or similar discretionary requirements that local governments impose relate to aesthetics, focus on the technical need for the service, and even seek to prevent installation of facilities in the public right of way in entire areas of the community. Those considerations have nothing to do with the communities' right of way management. Indeed, such discretionary requirements are generally imposed on ExteNet in addition to compliance with the community's standard permitting process by which they manage the public rights of way. For example, as revealed by the Virginia Joint Commenters who describe how there is a standard right of way access permit process that applies to all public rights of way users,[56] but that for "wireless" equipment there is an *additional*, separate zoning requirement.[57]

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[55] *See, e.g., City of Dallas*, 8 F. Supp. 2d at 591-92 (citing *TCI Cablevision*, 12 FCC Rcd. at 21441 ¶ 103 and *Classic Tel.*, 11 FCC Rcd. at 13082 ¶ 40); *see also Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd. 20227 (1996).

[56] Virginia Joint Commenters Comments at 16.

[57] *Id.* at 9-10.

The "Smart Communities Siting Coalition" ("Siting Coalition") comments demonstrate the desire to use discretionary, "siting" requirements to dictate technologies and be an arbiter of market entry. They introduce a "Report and Declaration" from a "technology expert" that essentially argues that cities should be the ones evaluating and dictating the technologies chosen by providers.[58] The Siting Coalition's comments reveal that they believe local governments should be the ones to "identify, leverage, and support other developing wireless technologies such as IoT networking sensors that will enable our communities to offer solutions related to transportation, energy, air pollution, public Wi-Fi, *and other new generation services*."[59] But that is market entry, not management of the public rights of way.

Fundamentally, some local governments express the view that telecommunications service provided via DNS networks have no right to occupy the public rights of way.[60] They believe that whether to even allow the installation of such technology and service is a purely local issue to be evaluated by each individual community.[61] The City of Austin, for example, asserts in its comments that its local officials should decide whether to allow deployment based on their view of the "specific needs of their constituents."[62] But under the 1996 Act, the market, not local regulation, is to control who enters the market to meet consumer needs.

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[58] Siting Coalition Comments at Exhibit 1 Report of Andrew Afflerbach.

[59] Siting Coalition Comments at 6 (emphasis added).

[60] *See, e.g.*, City of Arlington Texas Comments at 2-3.

[61] *Id.* at 2-3. The City of Arlington's argument that companies, such as ExteNet, have no right to occupy the public rights of way is wrong, as ExteNet is a certificated telecommunications provider entitled to right of way access under Chapter 283 of the Texas Government Code. Tex. Gov't Code § 283.052(a).

[62] City of Austin Comments at 4; City of Columbia Comments, SC Comments at 6. Austin also admits that its review for small wireless facilities is the same as for macro facilities. City of Austin Comments at 5.

The Maryland Municipal League's comments address deployment of DNS facilities as if it were a commodity that cities are allowed to manipulate through the fees they charge. The Maryland Municipal League asserts that "[d]esire for service is a huge incentive for cities to charge competitive access fees; ***charge too much and the technology moves to another city, charge too little and the number of deployments becomes burdensome***."[63] This remarkably candid admission reveals a view of telecommunications deployment that fundamentally conflicts with the deregulatory scheme in the 1996 Act. Local governments are not supposed to influence deployment by imposing higher or lower fees and regulations. Consumer demand, not municipal regulation is supposed to drive deployment.[64]

The proposition that local governments should be allowed to exclude a particular telecommunications service and technology from the public rights of way has nothing to do with right of way management. The public rights of way are a common use corridor that serves the public interest by providing a single location for communications and utility equipment, rather than scattered and duplicated deployment.[65] The installation of telecommunications equipment on poles is a well-established "use" of the public rights of way. That is why local governments historically have not required "zoning" approval for installation of new equipment on utility poles—even in residential zones. It is only because local governments have become accustomed to using zoning to regulate traditional, tall macro site towers on private property that they now seek to extend that same regulation to DNS facilities in the public rights of way. But the

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[63] Maryland Municipal League Comments at 2 (emphasis added).

[64] *TCI Cablevision*, 12 FCC Rcd. at 21440-41 ¶¶ 102, 105 ("Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers"); *Classic Tel., Inc.*, 11 FCC Rcd. 13082, 13095-96 ¶ 25 (1996).

[65] *See, e.g., Harris County Flood Control Dist. v. Shell Pipe Line Corp.*, 591 S.W.2d 798, 799 (Tex. 1979); *Minneapolis Gas Co. v. Zimmerman*, 91 N.W.2d 642, 649 (Mn. 1958); *City of Chandler v. Arizona Dep't. of Transp.*, 231 P.3d 932, 935-36 (AZ Ct. App. 2010).

presence of an antenna does not justify the disparate treatment and is not legitimate rights of way management as defined by Congress and the Commission. ExteNet's DNS facilities are no different than other telecommunications and utility installations in the public rights of way, and as a result, they should be subject only to the standard rights of way management permitting applied to other telecommunications occupants. Such discriminatory, discretionary, and burdensome requirements effectively prohibit the provision of telecommunications services in violation of Section 253(a).[66]

Local governments have also conceded that the impact of fear of RF emissions plays in trying to keep DNS facilities out of residential areas. For example, the comments of Montgomery County acknowledge that a primary obstacle to small wireless network deployment is public fear of RF emissions.[67] Although the County states that it "does not make siting decisions on the basis" of RF emissions, it catalogues anecdotal resident objections, and admits residents want them "to do much more to get federal agencies to act" to keep wireless facilities away from their homes.[68] Courts have recognized that often local government decisions – although not mentioning RF emissions – are clearly based on such concerns nonetheless.[69]

III. THE COMMISSION SHOULD CLARIFY THE APPLICATION OF SECTION 253 TO DNS

ExteNet's opening comments discussed in detail the legal and factual justification for the Commission to issue a declaratory ruling addressing Section 253. The other comments in this

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[66] ExteNet Comments at 34-36; *see also* WIA Comments at 41-47; AT&T Comments at 13-18.

[67] Montgomery County Comments at 28–33.

[68] *Id.* at 28–29.

[69] *See Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 495 (2d Cir. 1999); *New York SMSA LP v. Village of Mineola*, 2003 WL 25787525 (E.D.N.Y. Mar. 26, 2003); *California RSA No. 4 v. Madera County*, 332 F. Supp. 2d 1291, 1310 (E.D. Cal. 2003); *AT&T Wireless of Calif., LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1159-60 (S.D. Cal. 2003).

proceeding also support the need for the Commission to issue a declaratory ruling. The cities arguments against the Commission's jurisdiction and their interpretations of the 1996 Act are unavailing.

A. The Commission Has Broad Power Under the Communications Act To Issue Interpretations And Enact Rules Implementing Section 253

Many local government comments assert that the Commission lacks authority to issue a declaratory ruling on Section 253 or Section 332 as it pertains to siting of DNS equipment, or even to address anything having to do with local government regulation. ExteNet believes those assertions misinterpret relevant statutes and court cases that have considered these issues.

The Commission's power to interpret the Communications Act is expansive. Section 201(b) of the Act provides that the "Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[70] The courts agree that the FCC's authority to "execute and enforce" the Act, and to interpret its provisions, gives the Commission power to interpret each provision of the Act.[71]

In the appeal of the 2009 *Shot Clock Order*, the Fifth Circuit relied on prior cases to confirm the Commission's authority to issue an interpretation of Section 332(c)(7), despite the fact that Section 332(c)(7) assigns judicial review to courts.[72] Even the cases cited by the

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[70] 47 U.S.C. § 201(b). The Commission previously explained its belief that it "has broad general rulemaking authority that would allow it to issue rules interpreting sections 253 and 332" to promote broadband deployment. *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach & Reducing the Cost of Broadband Deployment by Improving Policies Regarding Pub. Rights of Way & Wireless Facilities Siting*, Notice of Inquiry, 26 F.C.C. Rcd. 5384, 5400 ¶ 57 (April 7, 2011) (citing 47 U.S.C. §§ 201(b), 303(r), and 4(i)).

[71] *See, e.g., AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371-75, 378 (1999); *Alliance for Community Media v. FCC*, 529 F.3d 763, 773 (6th Cir. 2008) ("the FCC possesses clear jurisdictional authority . . . to interpret the contours of section 621(a)(1)" of the Act, despite municipal arguments that "Congress never explicitly or implicitly delegated power to the FCC" in the text of that provision).

[72] *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

municipal commenters reveal that courts turn to the Commission's interpretive rulings in resolving disputes under Section 253.[73]

1. Section 253(d) Does Not Limit The Commission's Authority To Interpret Section 253(c)

Municipal commenters also argue that subsection 253(d) precludes the Commission from interpreting Section 253(c) because it expressly authorizes the Commission to preempt local legal requirements "that violates subsection (a) or (b)," but does not mention violations of subsection (c).[74] Those arguments cannot stand under *Iowa Utilities Board* and its progeny.[75] They also cannot stand under well-established principles of statutory construction.

Some municipal commenters strain the bounds of statutory interpretation to argue that the Commission has no power to interpret Section 253(c) because it is a savings clause.[76] No commenter questions the Commission's authority to consider preemption claims under Sections 253(a) or (b). Yet, those provisions do not exist in a vacuum: they must be read in the context of

[73] *See e.g.*, NARUC Comments at 12 (citing *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1272 (10th Cir. 2004) (relying on the Commission's interpretation of the "competitively neutral" and "nondiscriminatory" requirements in Section 253(c)); *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1192 n.11 (11th Cir. 2001) ("As the federal agency charged with implementing the Act, the FCC's views on the interpretation of § 253 warrant respect.")).

[74] 47 U.S.C. § 253(d); *see, e.g.*, City of New York Comments at 6-8; Cities in Washington Comments at 9-11; Siting Coalition Comments at 56; Texas Municipal Coalition at 24.

[75] *Iowa Utils. Bd.*, 525 U.S. at 382-383; *Alliance for Community Media*, 529 F.3d at 773 ("Where petitioners argument falls short . . . is in equating the omission of the agency from section 621(a)(1) with an absence of rulemaking authority."); *City of Arlington*, 668 F.3d at 254.

[76] City of New York at 8-9; Florida Coalition at 7, 11 (claiming the FCC has no authority to regulate local action with respect to government-owned buildings, park, and other government-owned property); Smart Siting Coalition at 56 (Section 253(c) does not give the Commission the authority to set prices to formulate regulatory fees or for the use of property; the Commission regulates communications, not property or facilities); Texas Municipal League at 22-25.

Section 253 and the Telecommunications Act of 1996, considered as a whole.[77] As a matter of plain meaning, if Section 253(c) is a potential savings clause, then whether any given legal requirement prohibits or has the effect of prohibiting any telecommunications service in violation of Section 253(a) requires analysis of whether the challenged requirement falls within the savings clause of Section 253(c). For the Commission to consider challenges under Sections 253(a), it *must* have the authority to consider Section 253(c),[78] as the Second Circuit recognized in *TCG New York, Inc. v. City of White Plains*.[79]

Ultimately, the Commission's Section 201(b) power, as enforced by the Supreme Court, extends to Section 253(c) and eliminates any argument that would contradict the Court's clear pronouncement of the Commission authority to promulgate rules under the Act.

2. Section 332(c)(7) Does Not Deprive the Commission of Authority to Interpret the Protection of Wireless Deployment Under Section 253 From Local Action

Local government commenters also argue that only Section 332(c)(7) applies to any deployment that involves "wireless," and therefore, Section 253 is inapplicable.[80] Those arguments are meritless. As ExteNet and others demonstrated, courts have held that although Section 332(c)(7) governs the judicial review of a specific wireless siting application denial, Section 253 governs questions of whether municipal requirements, in and of themselves, exceed

[77] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Our duty, after all, is 'to construe statutes, not isolated provisions.'") (quoting *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson,* 559 U.S. 280, 290 (2010)).

[78] *See generally* 2A Sutherland Statutory Construction § 47:9 (7th ed.) (In statutes with a proviso, "the enacting clause, saving clause, and proviso should be construed together.).

[79] *City of White Plains,* 305 F.3d at 75-76.

[80] *See* San Antonio Comments at 11; Siting Coalition Comments at 52 ("What is clear is that where Section 332(c)(7) applies, Section 253 cannot."); San Francisco Comments at 17-18.

local authority over telecommunications services in violation of the Act.[81] In any event, even if Section 332 is applicable, it is well-settled that the Commission has the authority to interpret that section through a declaratory ruling.[82] In *City of Arlington*, the Fifth Circuit made clear that Section 332(c)(7)(A) does not limit the Commission's authority to issue interpret and implement Section 332.[83]

B. The Commission Should Clarify The Section 253 Standard Defining Local Government Requirements That Effectively Prohibit Provision Of Telecommunications Services Via DNS

As discussed above, the Commission has a clear record that local governments are effectively prohibiting the provision of telecommunications services through their treatment of DNS in the public rights of way. Delay beyond even the longest period permitted by the Commission's shot clock is common. Many cities are imposing moratoria in response to applications to install DNS facilities.[84] Many other cities are imposing extensive, discretionary and/or zoning requirements that discriminate against DNS facilities and impose regulations that effectively prohibit the provision of telecommunications services. Accordingly, the Commission should clarify the standards applicable under Section 253, and that as a result, these actions violation Section 253.

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[81] *See* ExteNet Comments at 43 (citing *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002); *USCOC of Greater Missouri, L.L.C. v. Village of Marlborough*, 618 F. Supp.2d 1055, 1065 (E.D. Mo. 2009)); WIA Comments at 50; *see also Verizon Wireless (VAW) LLC v. City of Rio Rancho, NM*, 476 F. Supp. 2d 1325, 1336 (D.N.M. 2007).

[82] *City of Arlington,* 668 F.3d at 254.

[83] *Id.*

[84] T-Mobile Comments at 19; CTIA Initial Comments at 12; Verizon Comments at Exhibit A; AT&T Comments at 7; Crown Castle Comments at 15-19.

1. The Commission Should Emphasize That Local Requirements Need Not Be "Insurmountable" To Run Afoul Of Section 253

In its opening comments, ExteNet demonstrated that the correct interpretation of Section 253(a), as articulated by the Commission and numerous courts, is that local requirements need not be "insurmountable" or impose a complete prohibition of service to run afoul of Section 253.[85] Other commenters make the same point, and the record demonstrates that some recent court decisions incorrectly interpreted Section 253(a), imposing an extremely limiting standard that is inconsistent with the language and intent of the 1996 Act.[86] Accordingly, consistent with ExteNet's opening comments, the Commission should declare that the Ninth Circuit's decision in *City of Auburn v. Qwest Corp.*,[87] and other similar cases that adopted and enforced the Commission's *California Payphone* standard under Section 253, were correct, and that the restrictive interpretations adopted by the Eighth Circuit in *Level 3 Communications, L.L.C. v. City of St. Louis*[88] and the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*[89] were incorrect.

Rather than contradicting the need for Commission action, local government comments further emphasize the need for the Commission to clarify that Section 253(a) preempts more than just total bans.[90] For example, some local government commenters argue that under *Level 3* and

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[85] ExteNet Comments at 18, 22-27.

[86] ExteNet Comments at 28-29; WIA Comments at 34-39; CTIA Comments at 23-25; Verizon Comments at 11-13; AT&T Comments at 5-6.

[87] 260 F.3d 1160, 1175-76 (9th Cir. 2001), *overruled by Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571 (9th Cir. 2008).

[88] 477 F.3d 528, 532 (8th Cir. 2007).

[89] 543 F.3d 571 (9th Cir. 2008).

[90] *See, e.g.*, Siting Coalition Comments at 51 (arguing that to constitute a prohibition the regulation must "formally forbid" and that a "hindrance" does not rise to the level of a Section 253(a) violation).

Sprint, because small wireless facilities have been deployed, at all, there can be no Section 253(a) violation.[91] Other comments, such as the Virginia Joint Commenters, mis-state the application of the *California Payphone* standard.[92]

As ExteNet and other commenters explained, the fact that DNS facilities have been constructed at some point does not address how long it took, the terms and conditions that the provider had to simply accept, how many proposals were rejected, or how many locations were never even attempted because of known local impediments. Nor does it address how many small wireless facilities could have been deployed were it not for the significant barriers chronicled in the record. This is why the Commission should issue a declaratory ruling in this proceeding to confirm that local requirements need not be insurmountable to violate Section 253(a).

Requirements that impose substantial additional costs, for example, violate Section 253(a).[93] In the *Texas Preemption Order,* the Commission found that certain requirements would have the effect of prohibiting certain carriers from providing any telecommunications service contrary to section 253(a) because of "*the substantial financial investment*" required to meet those requirements.[94] Yet, under the theory advanced by local government commenters, there could never be a Section 253(a) violation unless a local government was so brazen as to

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[91] *See, e.g.*, Siting Coalition Comments at 55 (citing *Level 3* to support the argument that because there have been small wireless facilities deployed "there is no reason to find either a direct or effective prohibition, ***or even the possibility of a prohibition***" (emphasis added).); *see also* Siting Coalition Comments at 35-36, 55.

[92] Virginia Joint Commenters at 39-40. As WIA explained, although the Eighth Circuit gave lip service to the *California Payphone* decision, the Eighth Circuit's holding and actual analysis is clearly contrary to *California Payphone* as applied by the First, Second, and Tenth Circuits (and by the Ninth Circuit originally in *City of Auburn*). WIA Comments at 35.

[93] *See, e.g., RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000) (affirming *Silver Star Telephone Co.*, 12 FCC Rcd. 15639 (1997), *recon. denied*, 13 FCC Rcd. 16356 (1998)); *City of White Plains*, 305 F.3d at 76.

[94] *Texas Preemption Order*, 13 FCC Rcd at 3488, ¶ 78; *see also* Verizon Comments at 11-12.

adopt an explicit blanket ban on deployment. Clearly, Congress intended for a more sweeping, deregulatory preemption than that.[95]

Ultimately, the municipal comments emphasize ExteNet's point that *Level 3* and *Sprint* have had a significant adverse effect on deployment, and absent Commission action, local governments will continue to be emboldened to impose significant, discriminatory barriers to the provision of telecommunications service in violation Section 253.

2. The Commission Should Clarify That The Effective Prohibition Standard Of Section 332(c)(7)(B)(i)(II) Does Not Apply To DNS Facilities In The Public Rights Of Way

The Commission should also use this opportunity to clarify that the standards under Section 332(c)(7)(B)(i)(II) applicable to claims of effective prohibition for traditional tall macro towers is inapplicable to deployment of DNS facilities in the public rights of way. In its Comments, ExteNet explained that the traditional Section 332 standard for "effective prohibition" claims, which requires a showing of a "significant gap" in service and some ruling out of alternatives, was inappropriate and unworkable in the context of multi-node DNS networks.[96] Verizon likewise articulated why the Commission should now reject the "significant gap"/"alternatives" standard as anachronistic, contrary to the 1996 Act, and out of step with technological developments.[97]

Addressing this issue is not academic. ExteNet is increasingly encountering local governments that demand that ExteNet demonstrate that there is a "significant gap" in wireless

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[95] *See, e.g., TCI Cablevision*, 12 FCC Rcd. at 21441-43 ¶¶ 103-109; *Texas Preemption Order*, 13 FCC Rcd. at 3463 ¶ 4.

[96] ExteNet Comments at 44-45. It is also important to note that the "significant gap/alternatives" formulation was judicially created to reflect the understanding of technology at the time. There is nothing about those terms in the statute.

[97] Verizon Comments at 21-22.

service to be served by ExteNet's DNS, and that ExteNet's DNS network is the "least intrusive" or even the "only feasible" alternative to remedy the gap in wireless service.

As a threshold matter, that analysis is inappropriate for ExteNet because it ignores the fact that ExteNet provides telecommunications service via its DNS that is separate from the personal wireless service provided by ExteNet's customers. ExteNet has an independent right under Section 253(a) to provide its telecommunications service, regardless of the potential needs of its customers. In attempting to impose such a standard, local governments are ignoring ExteNet's independent telecommunications service, and focusing only on the needs of ExteNet's customers. No one would ever suggest that local governments are allowed to demand proof regarding the business needs of a "wireline" CLEC's customers. Yet, that is what local governments are doing to ExteNet.

Section 253(a) preempts local requirements that prohibit or have the effect of prohibiting the provision of "any" telecommunications service by "any" person.[98] To suggest that cities can demand proof of ExteNet's customers' needs is so far afield of the "deregulatory" scheme created by the 1996 Act as to nullify the 1996 Act. Moreover, as Verizon and others noted, the "significant gap"/"alternatives" standard that was created by judges in the face of traditional tower cases is meaningless and anachronistic in the context of DNS facilities.[99]

In addition, the emphasis on evaluation of "alternatives" has been rejected by the Commission under Section 253. The Commission and various courts have rejected the argument that Section 253(a) requires a showing that the provider has no alternatives, holding that

[98] 47 U.S.C. § 253(a).

[99] Verizon Comments at 20-22; 47 U.S.C. § 157(a) ("[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest").

challenged requirements need not be insurmountable.[100] Notably, in the *Minnesota Order*, the Commission rejected the argument that the availability of alternative rights of way (*i.e.* theoretically feasible alternatives) meant that the state's exclusive grant of access to state highway right of way did not effectively prohibit service in violation of Section 253(a).[101] The Commission rejected the state's argument that railroad rights of way were feasible alternatives and thus denying access to state rights of way did not violate Section 253(a). The Commission also rejected the argument that state "trunk highway" rights of way were an alternative, because they were "more costly and time-consuming to obtain permission to use state trunk highway rights of way than to obtain permission to use the freeway rights of way."[102] As such, the Commission's holding rebuts the assertion by some commenters in this proceeding that there is no prohibition of service under Section 253(a) because those commenters assert that DNS facilities could be installed on private property.[103] As AT&T explained, obtaining access to private property would be radically more expensive, time consuming, uncertain, and is not a feasible alternative.[104] As demonstrated above, the Commission and courts have repeatedly recognized that local requirements violate Section 253(a) when they that impose greater expense or burden, and the Commission should clarify that issue.

The importance of clarifying this issue is also demonstrated by local government comments that suggest DNS facilities are only installed to "improve" service quality and thus

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[100] *See, e.g., RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000); *City of White Plains*, 305 F.3d at 76.

[101] *In re State of Minnesota*, 14 FCC Rcd. 21697, 21709-10 ¶ 23 (1999).

[102] *Id.* at ¶ 27.

[103] *E.g.*, San Antonio Coalition Comments at 13.

[104] AT&T Comments at 10.

there can never be a gap in service to support an "effective prohibition" of service.[105] This is another example of local governments inserting themselves as arbiters of technology and business needs. Section 157(a) of the Act provides that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest."[106] The local government approach, which intimates that ExteNet cannot install this new technology unless it can prove to the local government an absolute need for DNS facilities, turns Section 157(a) on its head. Accordingly, ExteNet supports the proposals by T-Mobile and Verizon for the Commission to clarify that cities may not require a showing of "need" or other business basis for deployment of wireless facilities.[107]

C. The Commission Should Issue a Declaratory Ruling Interpreting Section 253(c) to Stop Municipalities From Extracting Unreasonable and Discriminatory Fees from DNS Providers

ExteNet's initial comments, along with others, demonstrate the need for the Commission to exercise its authority under Section 253 to rein in municipal demands for excessive, discriminatory, and unreasonable fees, which pose a substantial barrier to competition.[108] The comments of many local governments confirm the need for Commission action and offer no basis for the Commission to refrain from issuing such a declaration.

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[105] Siting Coalition Comments at 26.

[106] 47 U.S.C. § 157(a).

[107] T-Mobile Comments at 19; Verizon Comments at 21-22.

[108] ExteNet Comments at 39-41.

1. Comments Demonstrate That Many Local Governments Want To Profit From Small Wireless Network Deployment

The comments of local government demonstrate that many localities consider small wireless network deployment as an opportunity to generate revenue. New York City now approaches its regulatory authority over deployment as an opportunity to conduct "a form of hybrid competitive process" – an auction – for permission to use existing utility poles.[109] The City of Austin argues that cities are required "to act as landlords, rather than regulators," seeking to obtain the highest rent they can from a pool of potential tenants.[110] The San Antonio Coalition likewise argues that they should be allowed to set their prices like private landlords.[111] The Georgia Municipal Association argues that municipalities should charge fair market value defined as "what it would cost the user . . . to purchase access from a private property owner."[112] The Texas Municipal League characterizes its desire for unregulated monopoly rents at "value-based street rental fees."[113] The Siting Coalition goes so far as to say that *any* FCC regulation of the prices they charge small wireless networks "is bad policy," building an argument on the fallacy that the public rights of way are no different than any form of property.[114]

[109] City of New York at 4.

[110] City of Austin at 8.

[111] *See, e.g.*, Cities of San Antonio, etc. at 26 – 27.

[112] Georgia Municipal Comments at 5.

[113] Texas Municipal League at 11.

[114] Siting Coalition at 37.

2. Local Government Control Of Rights Of Way Is Not Analogous To Private Ownership Of Real Property

These arguments contend that local government control of the public rights of way entitles them to "market rates," just as if they were private property owners. However, local governments hold the public right of way in trust for the public, and not for commercial exploitation. Early on, the New York Supreme Court explained that:

> The city corporation, as fee holder of the streets, in trust, for public use as highways, is but an agent of the State. Any control which it exercises over them . . . is a mere police or government power delegated by the State.[115]

As the Supreme Court of Illinois put it:

> Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public. [116]

Other courts agree with this basic proposition.[117] Indeed, the Commission previously considered and rejected local government claims of "proprietary" interests:

> We also reject the franchising authorities' argument that any attempt to preempt lawful local government control of public rights-of-way by interfering with local franchising requirements,

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[115] *People v. Kerr*, 27 N.Y. 188, 213 (1863).

[116] *AT&T v. Village of Arlington Heights*, 156 Ill. 2d 399, 620 N.E.2d 1040 (1993).

[117] *See, e.g., City of Mission v. Popplewell*, 294 S.W.2d 712, 715 (Tex. 1956) (holding that "The city controls the streets as trustee for the public. It has no proprietary title nor right to exclusive possession" and "Courts everywhere decline to recognize that the city possesses any property rights in the streets"); *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644-45 (Tex. 2004) ("even though legal title was taken in the county's name, title was held for the benefit of the State and the general public"); *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063, at *16-18 (S.D.N.Y. 2004) (holding that City's requirements and fees for use of city-owned poles "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy"); *Mayor and City Council of Baltimore v. United States*, 147 F.2d 786, 788-89 (4th Cir. 1945) (County "is not entitled to compensation as if it were the owner of an unqualified interest in the land"); *City of Des Moines v. Iowa Tel. Co.*, 162 N.W. 323, 325 (Iowa 1917) (city holds streets in trust for the public); *City of Vicksburg v. Marshall*, 59 Miss. 563, 571 (1882).

> procedures and processes could constitute an unconstitutional taking under the Fifth Amendment of the United States Constitution. . . . Courts have held that municipalities generally do not have a compensable "ownership" interest in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public. As one court explained, 'municipalities generally possess no rights to profit from their streets unless specifically authorized by the state.'[118]

Municipal commenters offer no argument or fact that would change the Commission's analysis in this proceeding. The Commission should once again reject claims that local governments are the same as private property owners when they regulate DNS providers' access to public rights of way.

There is no market for public rights of way or existing utility and light poles. The public right of way exists as a function of the sovereign power, used to establish corridors for the movement of people, electric energy, and communications.[119] As one court explained in rejecting a municipal claim of "proprietary" ownership of its rights of way, "the control the municipality exerts over the easement is a function of its powers as trustee, conventionally expressed as the police power to manage the public right of way. Distinct from public parks or government buildings, the municipality does not possess ownership rights as a proprietor of the

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[118] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, 5160-61 ¶ 134 (2007) (citing Liberty Cablevision, 417 F.3d at 222, and See New Jersey Payphone Ass'n, Inc. v. Town of West New York, 130 F.Supp.2d 631, 638 (D.N.J. 2001)).

[119] *See, e.g., Postal Telegraph Cable Co. v. Baltimore*, 79 Md. 502, 29 A. 819, 820-822 (Md. 1894) (Where telephone company installs utility poles in streets, "it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation…"); *Harris County Flood Control Dist. v. Shell Pipe Line Corp.*, 591 S.W.2d 798, 799 (Tex. 1979) (public rights of way "have been held to include the laying of sewer, gas and water pipes, ***telegraph and telephone lines***.") (emphasis added); *Minneapolis Gas Co. v. Zimmerman*, 91 N.W.2d 642, 649 (Mn. 1958) ("the use of rights-of-way by utilities for locating their facilities is one of the proper and primary purposes for which highways are designed even though their principal use is for travel and the transportation of persons and property").

streets and sidewalks."[120] Instead, local governments have *regulatory authority* over the use of the streets and rights of way. And that regulatory authority is limited by Section 253. In addition, cases recognize that in some instances local governments exercise *regulatory* authority, even over property they own, such as light poles, and in those instances, their actions are governed by Section 253 and Section 332.[121] Where the locality imposes permitting and zoning obligations on small wireless networks for the use of public rights of way, they are plainly acting not in a "proprietary" capacity, but as the government which controls public rights of way, and as the regulator of competitive telecommunications service providers.[122]

In some areas, the local government prohibits any utility or light poles other than its own,[123] and refuses to allow any other entity to install alternative poles. In these areas, the government-owned poles constitute the only above ground utility easement or corridor for deployment of DNS.[124] A policy of allegedly "nondiscriminatory access" to the rights of way in these areas is meaningless if the terms and conditions for access to the poles – the cost – effectively prohibit cost-effective construction. Regardless of whether these municipal poles resemble property held by private entities, the *manner* in which the local authorities leverage them to impose regulations and fees on small wireless networks is a function of local regulation.[125] There is nothing "proprietary" about such poles or rights of way in the context of

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[120] *New Jersey Payphone Ass'n v. Town of West New York*, 130 F. Supp. 2d at 638 (citation omitted).

[121] *NextG Networks of NY, Inc. v. City of New York*, 2004 U.S. Dist. Lexis 25063 (S.D.N.Y. 2004).

[122] *Id.*

[123] *See, e.g.*, City of New York Comments at 4; Siting Coalition Comments at 10; Minneapolis Comments at 3.

[124] *Id.*

[125] *NextG Networks*, 2004 U.S. Dist. Lexis 25063 at *16-18.

wireless network deployment and in the manner being exercised by local governments. If a small wireless network operator fails to accept the demands made by a local government, the carrier is prohibited from accessing the public rights of way and has no choice but to abandon the project.

3. Local Governments' Misinterpret Section 253(c)

In its initial comments, ExteNet detailed how Section 253(c), properly construed in the context of the 1996 Act, limits the fees and other compensation local governments are permitted to charge for use of the public rights of way. Specifically, Section 253(c) allows localities to recover the direct costs incurred in managing the provider's use of the public rights of way.[126]

Local governments disagree, which highlights the need for the Commission to bring clarity to the "confusing linguistic construction of § 253(c)," to quote one federal court.[127] Contrary to local government comments,[128] even a cursory review of the text of Section 253(c) and the court decisions attempting to apply it shows that the provision is at the least ambiguous, and warrants the Commission's issuance of a declaratory ruling to confirm that the statute limits

[126] ExteNet Comments at 39–41. *New Jersey Payphone Ass'n v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd on other grounds*, 299 F.3d 235 (3rd Cir. 2002) (citing *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp.2d 805, 817 (D. Md.1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir.2000); *Peco Energy Co. v. Township of Haverford*, 1999 WL 1240941, *7 (E.D. Pa.1999)). *But see TCG Detroit*, 206 F.3d at 625; *see also City of White Plains*, 125 F.Supp.2d at 96.

[127] *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272 (10th Cir. 2004) (noting the "confusing linguistic construction of § 253(c)"); *see also New Jersey Payphone*, 299 F.3dat 240 ("Section 253 is quite inartfully drafted and has created a fair amount of confusion.").

[128] Texas Municipal League at 24 (claiming Section 253 is "a model of clarity"); National League of Cities at 16 (Section 253(c) is "not ambiguous"). Tellingly, both the Texas Municipal League and National League of Cities comments implicitly acknowledge the ambiguity of the statute by arguing that its legislative history sheds light on their version of its meaning. Texas Municipal League at 22; National League of Cities at 22-24.

local governments to cost recovery for their role in managing DNS use of the public rights of way.

As noted above, the views submitted by some local governments reveal that they consider DNS deployment as an opportunity to engage in monopoly price gouging, creating a significant impediment to the deployment of service in a fair and balanced legal and regulatory environment. For example:

- The Georgia Municipal Association claims power to charge "fair market value" defined as "what it would cost the user . . . to purchase access from a private property owner;"[129]
- Minneapolis uses its Code to make its poles easier to be approved, thus driving use of and profit from its poles;[130]
- The San Antonio commenting group views themselves as private landlords, complaining that nondiscriminatory fees "is certainly not how property is priced in the private sector;"[131]

These and other local government comments demonstrate the validity of court concerns that "Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns."[132]

Local governments' management of the public rights of way is simply not analogous to commercial real estate management. The "maximum rent" approach of many municipal

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[129] Georgia Municipal Comments at 5.

[130] Minneapolis Comments at 3-4 (no zoning for wireless facilities if they are attached to city-owned poles; zoning applies if use privately owned poles).

[131] *See, e.g.,* Cities of San Antonio, etc. at 26–27.

[132] *City of White Plains*, 305 F.3d at 79; *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (quoting *City of White Plains*, 305 F.3d at 79).

commenters undermines Congress' intent that Section 253 open local markets to greater deployment of telecommunications service facilities in a fair and balanced legal and regulatory environment.[133] Congress did not intend to allow cities to profit from new market entrants, but instead intended to preserve the ability of cities to recover the costs directly created by managing the new users' occupation of the rights of way.

As ExteNet explained in its initial comments, local government fees for DNS use of the public rights-of-way must be competitively neutral and nondiscriminatory under Section 253(c).[134] The record confirms that many local governments' fees on small wireless facilities are much higher than the fees, if any, imposed on other telecommunications right of way users of the public rights of way.[135] Contrary to the arguments of municipal commenters that they should be able to charge new DNS networks more, the Commission and courts faced with discriminatory fees imposed only on new entrants have rejected them under Section 253.[136] The Commission filed an *amicus* brief before the Second Circuit in *City of White Plains* in which it stated that "a local telephone franchise fee that applies only to new entrants and not to incumbent local

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[133] *See* Maryland Municipal League Comments at 2 (recognizing that local government fees can prohibit deployment).

[134] ExteNet Comments at 39-41; *see also* WIA Comments at 63-66; Crown Castle Comments at 27-30; Verizon Comments at 14-17; Lightower Comments at 27-29; T-Mobile Comments at 10-14; ExteNet Comments at 39-41.

[135] WIA Comments at 64; *see also* ExteNet Comments at 10; Crown Castle Comments at 11-14.

[136] *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, Appendix H at 7621-22 ¶ 29 (1994) (rejecting costs imposed only on new entrants); *City of White Plains*, 305 F.3d at 79 (fee imposed only on new entrant but not incumbent violates Section 253); *RT Commc'ns*, 201 F.3d at 1269 (rejecting argument that regulation was "competitively neutral" because it treated all *new* entrants the same). *But see TCG Detroit v. City of Dearborn*, 206 F. 3d 618, 625 (6th Cir. 2000) (city did not violate Section 253 by charging only new entrants fees because its attempted to impose the same fees on the incumbent but was barred under state law).

exchange carriers is not competitively neutral and nondiscriminatory under section 253(c)."[137] Because the touchstone for interpretation of Section 253(c) is Congressional intent to foster competition by removing local barriers, there is no lawful reason under Section 253(c) for local governments to discriminate against DNS facilities in the fees imposed for use of the rights of way. Fees for different companies might reflect the costs that their particular use imposes on the local government, but those fees cannot under any rationale burden DNS networks disproportionately.

IV. CONCLUSION

Based on the foregoing, ExteNet's opening comments, and the record in this proceeding, the Commission should take this opportunity to issue a declaratory ruling that will clarify the original intent of Congress, clarify what constitutes DNS, and clarify the correct meaning and application of Section 253.

Respectfully submitted,

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[137] FCC Br. in *City of White Plains*, 2001 WL 34355501, at *8.